**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 1152 of 2004**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE R.H.SHUKLA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**SUSHILABEN RATILAL VALWALA & 3 - Petitioner(s)**
**Versus**
**PADMABEN NAVNITLAL & 5 - Respondent(s)**

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**Appearance :**

MR RR MARSHALL for Petitioner(s) : 1 - 4.
None for Respondent(s) : 1,1.2.1
MR DHIRENDRA MEHTA for Respondent(s) : 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.2.6, 1.2.7, 1.3.1, 1.3.2, 1.3.3, 1.3.4, 1.3.5, 1.3.6, 1.3.7, 1.3.8,1.3.9 - 6.
- for Respondent(s) : 0.0.0,0.0.0

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**CORAM : HONOURABLE MR.JUSTICE R.H.SHUKLA**

**Date : 18/12/2007**

**ORAL JUDGMENT**

1. The present petition has been filed under

Article 227 of the Constitution of India, challenging the order passed by the learned Extra Assistant Judge, Surat below application exh.89 in Regular Civil Appeal No. 89 of 1988 dated 5.4.2003 rejecting an application for the amendment.

2. The facts briefly stated are that Respondent No.1 had filed Regular Civil Suit No. 138 of 1977 before the learned 3rd Joint Civil Judge (SD), Surat against the petitioners and the property bearing Survey No. 4262 situated at Navapura, Bundelawad, Surat is claimed to be the sole ownership of Respondent No.1 and the present petitioners are the heirs or the sons and the mother who was not getting along with the husband was permitted to stay out of grace. Therefore, it has been contended that as the permission was granted out of grace to stay in the premises to the mother of the petitioners, who has expired during the pendency of the litigation, the petitioners herein have no right inasmuch as the mother was only given right to residence till her death. However, there is a dispute with regard to this aspect as it is claimed that by Will dated 18.5.1944 executed by the father of Respondent No.1 and the mother of the petitioners herein, by which also the mother of the petitioners herein had a right to stay in the premises. It is this aspect which is a bonafide contention in the trial Court. An application for amendment was moved on behalf of

the petitioners herein to add the averments that the mother had not only a right to stay, but as per the provisions of the Hindu Succession Act, she had a right in the property, and therefore, as the heirs of the deceased mother, the petitioners herein have claimed their right for which an application for amendment was given, contending inter alia that it was not only the right to residence but the deceased mother had also a right in the property under the Hindu Succession Act. In other words, by amendment, the higher or better rights are sought to be claimed. The amendment application was heard and decided by the impugned order dated 5.4.2003 by the learned Extra Assistant Judge, Surat below application exh. 9 and it was rejected. It is against this order, the present petition has been filed.

3. Learned advocate Mr. R.R.Marshall for the petitioners submitted that the mother of the petitioners was permitted to stay, as she was not getting along with the husband and thereafter the father of the Respondent No.1 as well as the mother of the petitioners herein had executed a Will dated 18.5.1944, by which the right of residence was given to the mother of the petitioners herein. Therefore, the learned advocate Mr. Marshall has submitted that though a limited right of residence was given pursuant to the Will of the father dated 18.5.1944 by amendment subsequently in the Hindu Succession

Act in 1956, mother of the petitioners herein could claim the right or interest in the property and therefore, the present application for amendment has been made to claim a better or higher right, which is purely legal aspect and therefore, amendment could not have been rejected. In support of the submissions that amendment should have been granted, the learned advocate Mr. Marshall has referred to and relied upon the judgments reported in 1994(2) GLH 244, AIR 1994 SC 618 and also 997(2) GLH 434.

4. Learned advocate Mr. D.K.Mehta appearing for the respondents submitted that such a plea has been sought to be taken up by amendment in the written statement at much belated stage after the evidence is not only over but during the pendency of the appeal and therefore, the impugned order dated 5.4.2003 passed by the learned Extra Assistant Judge, Surat is just and proper. It was submitted by Mr. Mehta that mother of the petitioners who was not getting along with well with the husband was permitted out of grace to stay in the premises and father while executing a Will dated 18.5.1944 had also given a limited right of residence which is now sought to be converted into a full fledge right or the interest in the property and therefore, it cannot be permitted. Moreover learned advocate Mr. Mehta has submitted that if such a contention or plea was required to be taken it could have been taken initially inasmuch as this

right after the amendment in the Hindu Succession Act, 1956 was already there and therefore, as provided in Order 6 Rule 17, the party has to be diligent and if has failed to take up the grounds, it cannot be subsequently permitted to be added. Learned advocate Mr. Mehta also submitted that the evidence has already been over and it is the appeal which is pending, which would cause prejudice to the right of the parties, and therefore, the learned Judge has rejected the application for amendment, not only on the ground of delay but on the justification. Therefore, the learned advocate Mr. Mehta submitted that the present petition deserves to be rejected. It was also submitted that if the present amendment is granted, it would amount to allowing inconsistent pleas being taken and therefore also such an amendment could not have been allowed and it has rightly been rejected. Learned advocate Mr. Mehta, therefore, submitted that there is no jurisdictional error committed by the Court below and considering the scope of Article 227 of the Constitution of India, this Court may not interfere with the impugned order. Learned advocate Mr. Mehta has also referred to and relied upon the judgments reported in 1986(1) GLR 451, and AIR 1998 SC 618. Learned advocate Mr. Mehta has also referred to the Hon'ble Apex Court's judgment reported in AIR 1997 SC 3082 and has submitted that in that case

also right or the claim was sought to be expanded and the Court had not permitted after the lapse of time and therefore, in the present case, by amendment, if the better or the higher rights are sought to be claimed, the same cannot be permitted.

5. In view of the rival submissions it is required to be considered whether the impugned order dated 5.4.2003 passed by the learned Extra Assistant Judge, Surat below application exh.89 in Regular Civil Appeal No. 89 of 1988, calls for any interference in exercise of powers under Article 227 of the Constitution of India or not. It is well settled that the criteria for grant of amendment has no longer been res integra and it has been decided in catena of decisions of the Hon'ble Apex Court that when the amendment can be granted. The main points to be considered before a party is allowed to amend is pleadings are:

(i) Whether the amendment is necessary for determination of real question in controversy.

(ii) Can the amendment be allowed without injustice to the other side.

In other words the basic test which governs the course, power of amendment is the amendment is necessary to decide the real controversy between the parties or not. Further it is also required to be appreciated that the procedural laws are handmade to the administration of justice with underlying object of real justice between the

parties. Therefore, even after the amendment in the Code of Civil Procedure particularly Order 6 Rule 17 restricting or modifying the procedure with regard to the amendment, the discretion has been diluted and explained in subsequent judgment of the Hon'ble Apex Court, reported in reported in AIR 2005 SC 3353 – Salem Advocate Bar Association v. Union of India, discussed at length and referring to the provisions of Order 6 Rule 17. It is specifically observed that; if the application for amendment is filed after commencement of the trial, it has to be shown that inspite of the diligence such an amendment could not been sought earlier. Even in light of the subsequent judgments, the amendment normally is required to be allowed unless it changes the very nature or controversy and second it causes prejudices to the other side. This principles have been well accepted and therefore while considering in a given set of facts, the application for amendment is required to be appreciated and considered in light of these principles.

6. In the facts of the case, I am conscious and aware about the amendment in Order 6 Rule 17, which has been brought out to curb unnecessary delay and the frivolous plea being raised at belated stage. However, in the facts of the present case it is not in dispute that the mother of the petitioners was given right to residence, whether by grace or by a Will of the

father dated 18.5.1944. After that the amendment has been made in the statute, that is Hindu Succession Act in 1956 which give the better or the higher right to the daughter. The petitioners herein are the sons who desires to claim such right that mother had a right in the property in question. Therefore, it is purely a question of law inasmuch as even if such a plea may not have been raised for whatever reason in the pleadings and the trial or at subsequent stage, the question of law with regard to the right of a party mainly mother of the petitioners herein is required to be considered and therefore even if this application for amendment is granted, it would have at the most permitted petitioner claim a higher or better right which would be again decided at the trial on its merits on the basis of the evidence. The fact that whether the mother of the petitioner was given only a right of residence by grace or whether a limited right was given pursuant to the Will. Therefore, once such rights are given or bequeathed as per the Will, could it be enhanced in light of the amendment in the Hindu Succession Act, is required to be examined at the trial in light of the evidence and the Will. Even if by amendment in the law or the statute, a female is entitled to get a right in the property and yet if a limited right is given by a Will, it will depend upon the recitals and construction of Will, which will have to be

interpreted as to whether a limited right for residence was given. Therefore, on one hand, as per the amendment in the statute one may have better or higher right as per the Act. Therefore, these are the questions, which can be considered at the trial. Therefore, merely by permitting such plea being taken, the right is not established and again even if such a plea or amendment, which is sought to be made, it will have to be decided at the trial in accordance with law on the basis of material and evidence like Will and other evidence. The contention which is sought to be raised, therefore is purely of legal nature and therefore the learned Judge failed to appreciate that the plea sought to be added by the impugned amendment was not with regard to any change in the circumstances or any new case but was only sought to be raised on the basis of the amendment in the Hindu Succession Act and the right or the higher right claimed on such basis. There is no doubt that this plea also could have been taken initially but at the same time it is purely a question of law irrespective of any pleadings inasmuch as the petitioners have sought to contend a better or higher right that the mother had not only right to residence but also a right in the property. It is this aspect which is required to be considered at the trial and it would not cause any prejudice to the respondents herein.

7. The another facet of the submission that such a

plea or amendment is sought to be made at the appellate stage in the appeal when the evidence has been over at the trial. It is well settled that the appeal is in continuation of the original pleadings and the contention of the amendment which is sought to be added is purely of a legal nature, which does not require any further evidence. Learned advocate Mr. Marshall has stated at the bar that he would not claim any right for leading any further evidence and would proceed on the basis of the evidence as it is to establish the right. However, the learned advocate Mr. Mehta has shown some apprehension and therefore, the liberty is required to be reserved if the respondents herein desire to have any evidence to be lead on this aspect, then the permission shall be granted to both the sides.

8. Therefore, in view of the discussion made hereinabove, the present petition deserves to be allowed. It goes without saying that the Court below shall decide the appeal on merits and in accordance with law without being incluenced in any manner by this order. The order below application exh. 89 dated 5.4.2003 passed by the learned Extra Assistant Judge, Surat is hereby quashed and set aside. The application for amendment exh. 89 is allowed. The interim relief staying the proceedings of the appeal stands vacated. Rule is made absolute.

(R.H.Shukla,J)

Jayanti*